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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Trinity)

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THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
MICHAEL BLAIR DAVIS,  
  
Defendant and Appellant.

C058585  
  
(Super. Ct. Nos.  
07F039, 07F128,  
07F030A)

Three separate informations charged defendant Michael Blair Davis with manufacturing methamphetamine, possession of isomers of methamphetamine with intent to manufacture methamphetamine, burglary, and receiving stolen property. Following plea negotiations, the court sentenced defendant to five years eight months in state prison. Defendant appeals, contending the court erred by imposing restitution on a dismissed count for which there was no *Harvey* waiver.<sup>1</sup> We shall affirm the judgment.

**BACKGROUND**

**Case No. 07F030A:** In March 2007 officers were contacted concerning a possible methamphetamine laboratory in the back of

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<sup>1</sup> *People v. Harvey* (1979) 25 Cal.3d 754 (*Harvey*).

a pickup truck parked along the shore of Trinity Lake. The investigating officer located the truck and observed several plastic bottles containing colored liquid; one bottle, turned upside down, contained colored liquid and had a white solid substance at the bottom. The pickup also contained a white plastic bottle marked "Muriatic Acid" and a mason jar with a coffee filter containing a white substance. The officer detained defendant along with two other individuals.

An information charged defendant with the unlawful manufacture of methamphetamine and possession of isomers of methamphetamine with intent to manufacture methamphetamine. (Health & Saf. Code, §§ 11379.6, subd. (a), 11383.5, subd. (b)(1).)

**Case No. 07F039:** The next day, officers served a search warrant at defendant's residence. There they found evidence of methamphetamine production, including a box of rock salt, bottles of hydrogen peroxide and muriatic acid, receipts for pseudoephedrine, a cooler, and coffee filters. The filters had a white powdery residue in the bottom that tested positive for methamphetamine.

An information charged defendant with a violation of Health and Safety Code section 11379.6, subdivision (a) for the unlawful manufacture of methamphetamine and alleged the offense was in violation of Penal Code section 1203.073,

subdivision (b) (3).<sup>2</sup> The information further alleged defendant was armed with a firearm during the commission of the offense. (Pen. Code, § 12022, subd. (c).)

**Case No. 07F128:** In July 2007 officers investigated the burglary of a travel trailer. In a shed nearby, the owner of the trailer found a knife with defendant's name scratched into the blade. The owner of the trailer and his wife identified property found in defendant's possession at the time of his arrest and during a subsequent search of his residence as items stolen from the trailer.

An information charged defendant with burglary and with receiving stolen property on two separate occasions. (§§ 459, 1192.7, subd. (c), 667.5, subd. (c), 462, subd. (a), 496, subd. (a).)

Defendant entered a plea of not guilty to all charges. Pursuant to plea negotiations, defendant subsequently entered changes of plea as follows: in case No. 07F039, guilty of manufacturing methamphetamine, with dismissal of the firearm allegation; in case No. 07F030A, guilty of possession of isomers of methamphetamine with intent to manufacture methamphetamine, with dismissal of the methamphetamine manufacturing charge; and in case No. 07F128, guilty of one count of receiving stolen property, with the other receiving count dismissed with a *Harvey* waiver and the burglary count dismissed without a *Harvey* waiver.

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<sup>2</sup> All further statutory references are to the Penal Code unless otherwise indicated.

The court sentenced defendant to five years eight months in state prison: in case No. 07F039, the principal term on count one of five years; in case No. 07F030A, a concurrent term on count two of four years; and in case No. 07F128, a consecutive term on count two of eight months. Defendant filed a timely notice of appeal.

### **DISCUSSION**

In case No. 07F128, an information charged defendant with burglary, count one, and two counts of receiving stolen property, counts two and three. Defendant pled guilty to one count of receiving stolen property, and the court dismissed counts one and three. Defendant entered a *Harvey* waiver as to count three.

The court ordered defendant to pay \$5,882 in restitution for the items taken in the burglary. The court, during sentencing, questioned the probation officer about the source of the figure recommended in the probation report. The probation officer stated the burglary victims submitted an inventory of the missing items, which the officer attached to her report. The list reflects that no amounts were claimed for items recovered from defendant's residence. Defendant argues the court's imposition of restitution runs afoul of section 1192.3.

Section 1192.3, subdivision (b) requires the court to obtain a *Harvey* waiver from the defendant if the court imposes restitution relating to a dismissed count. In *Harvey*, the Supreme Court held that the facts of dismissed counts could not be used to aggravate the sentence on counts to which a defendant

pled in exchange for the dismissal of other counts. (*Harvey*, *supra*, 25 Cal.3d at p. 758.) In the absence of a *Harvey* waiver, the court may not order restitution on dismissed counts.

(*People v. Escobar* (1991) 235 Cal.App.3d 1504, 1512 (*Escobar*).)

Defendant argues the parties negotiated a *Harvey* waiver only on the receiving count, not the burglary count. Since all of the victims' property found in defendant's possession was returned, the restitution related only to the items taken in the burglary that were not recovered. Since there was no *Harvey* waiver as to the burglary count, the court erred in imposing restitution.

However, in imposing the restitution, the court stated: "The court is ordering the defendant to pay restitution in the amount of \$5,882. And that's based on the plea to count two and the *Harvey* waiver as to count three in 07F128." The court did not refer to the burglary count in awarding restitution to the victims.

Even if the court had imposed restitution based on the dismissed burglary count, restitution would have been appropriate under an exception to *Harvey*. If a dismissed charge is transactionally related to an admitted charge, it can be considered in disposing of the case even when a *Harvey* waiver is not secured. (*In re Carl N.* (2008) 160 Cal.App.4th 423, 427, fn. 3.)

Crimes are transactionally related when they are closely connected in time and place so as to comprise a single criminal transaction. In addition, there must be facts from which it can

be inferred that some action on the defendant's part giving rise to the dismissed count also played a part in the admitted count. Whether two crimes are transactionally related is a factual determination requiring consideration of all the circumstances relating to the admitted offense. (*People v. Valenzuela* (1995) 40 Cal.App.4th 358, 363-364; *People v. Beagle* (2004) 125 Cal.App.4th 415, 421.)

Here, a knife bearing defendant's name was found in a shed near the burglarized trailer. The victims of the burglary identified property found in defendant's possession as property stolen from their trailer. Given these circumstances, the burglary and the receiving stolen property counts were transactionally related and the court did not err in imposing restitution for the stolen property.

However, defendant argues the court's imposition of a restitution fine improperly amounted to an assignment of liability in violation of his due process rights. In support, defendant relies on *Escobar, supra*, 235 Cal.App.3d 1504.

In *Escobar*, the defendant pled guilty to violating Vehicle Code section 20001, the hit-and-run offense of leaving the scene of an accident involving injury. As part of the defendant's sentence, the trial court ordered him to pay restitution to the victims of the accident. (*Escobar, supra*, 235 Cal.App.3d at p. 1507.)

The appellate court reversed. The court noted the defendant had pled guilty only to leaving the scene, not for the accident that caused the injuries. According to the court:

"Restitution is proper only to the extent that the victim's injuries are caused or exacerbated by the offender's leaving the scene." (*Escobar, supra*, 235 Cal.App.3d at p. 1509.) The court concluded that conviction of leaving the scene is insufficient to support restitution for injuries caused by the accident itself. (*Id.* at pp. 1512-1513.)

Defendant analogizes his case to that of the defendant in *Escobar*: "Similarly, here, [defendant] did not admit to the burglary, but only to receiving some of the property. The court should not be allowed to assign civil liability without the proper protections."

However, the court in *Escobar* distinguished cases in which restitution was proper. In one such case, "the trial court had obtained a *Harvey* waiver from [the defendant] at the time of the plea, which permitted it to consider dismissed charges for sentencing purposes." (*Escobar, supra*, 235 Cal.App.3d at p. 1512.) Those dismissed charges included driving under the influence, which could be viewed as either the cause of the victim's injury or as an act committed with the same state of mind as fleeing the accident. In contrast, in *Escobar*, no *Harvey* waiver was obtained and none of the dismissed charges could be considered to have caused the accident, rendering restitution improper. (*Ibid.*)

Here, the dismissed charges included a burglary charge. Under the reasoning of *Escobar*, the dismissed burglary count could support imposition of restitution, since the burglary caused the damages defendant was ordered to reimburse.

**DISPOSITION**

The judgment is affirmed.

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RAYE, J.

We concur:

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BLEASE, Acting P. J.

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NICHOLSON, J.